United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1256

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To be argued by
RICHARD D. WEINBERG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1256

UNITED STATES OF AMERICA,
Appellee,

—v.—

MARTIN SCHWARTZ,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

RICHARD D. WEINBERG,
JOHN C. SABETTA,
Assistant United States Attorneys, Of Counsel.

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Preliminary Statement

Martin Schwartz appeals from a judgment of conviction entered on June 6, 1975, after a jury trial before the Honorable Thomas P. Griesa, United States District Judge.

Indictment 74 Cr. 646, filed on June 25, 1974, charged defendants Martin Schwartz and Harold Von Maker in Counts Two and Three with mail fraud in violation of Title 18, United States Code, Sections 1341 and 2, in Count Nine with pledging as security for a loan goods and merchandise which had been unlawfully converted and taken in violation of Title 18, United States Code, Sections 2315 and 2, and in Count Ten with receiving, concealing, storing, selling, and disposing of goods and merchandise which had been unlawfully converted and

taken in violation of Title 18, United States Code, Sections 2315 and 2. The other counts in the indictment name only Harold Von Maker and charge him with other related and distinct instances of fraudulent conduct.

Trial on Indictment 74 Cr. 646 commenced on April 14, 1975, and continued until April 26, 1975 when the jury found Schwartz guilty on Counts Two, Three, Nine, and Ten.*

On June 6, 1975, Judge Griesa sentenced Schwartz to a term of imprisonment of two years on each count, to be served concurrently. Schwartz is free on bail pending this appeal.

Statement of Facts

I. Summary

In September, 1972 Martin Schwartz began to serve as counsel for Harold Von Maker ** and Von Maker's business Antique Investors, Inc. Antique Investors was engaged in the business of buying and selling art works. In addition to serving as an attorney for Wertz and Antique Investors, Schwartz became Wertz's business partner in a number of ventures. For example, in June and July 1973 Schwartz and Wertz agreed to become coventurers and to invest $100,000 in Salads of America, a company which intended to market salad vegetables grown in the Dominican Republic.

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* Von Maker, who was named in all fifteen counts of the indictment, has been a fugitive since September 24, 1974 when a bench warrant for his arrest was issued.

** Von Maker used the alias Peter Wertz. Since most people involved in the facts of this case initially knew Von Maker as Wertz we will generally refer to Von Maker as Wertz in this brief. As explained below there is some dispute as to when Schwartz learned that Wertz's real name was Harold Von Maker.

In early June, 1973 Wertz began to negotiate for the purchase of several pieces of fine art from Maxwell Galleries in San Francisco, California. By October, 1973 Wertz had agreed to buy three paintings from the art gallery for a total purchase price of $100,000. He purchased Jackson Pollock's "Crucifixion," Thomas Hart Benton's "Susanna", and Mary Cassatt's "Madame Cordier." Wertz claimed to be purchasing the paintings for his own collection and agreed to pay for each painting thirty days after receiving the painting. Von Maker employed the alias Wertz in all his dealings with the gallery, and never disclosed his real name or the fact that he had been convicted of a crime relating to fraud. The gallery never received payment for the paintings. On December 7, 1973 Wertz sent two checks to Maxwell Galleries totalling $90,000. Neither check was backed by sufficient funds and no payment was ever collected on either.

In August 1973 Schwartz and Wertz needed money for their joint investment in Salads of America. Schwartz thereafter arranged for Antique Investors to borrow $100,000 from K.R.R. Associates. The interest on the loan was substantial. Wertz began to default in his payments on the loan. In October, 1973 Schwartz, still in need of funds for Salads of America, asked Edward Loughran to locate a lender willing to accept the Jackson Pollock "Crucifixion" as collateral. When Loughran was unable to obtain the loan, Schwartz pledged the painting as collateral for a $75,000 loan from an upstate New York bank on November 28, 1973. A substantial portion of that loan was used by Schwartz to meet the financial commitment he and Wertz had made to Salads of America.

During November and December, 1973 Schwartz tried to arrange for the sale of Antique Investors' entire art inventory or to obtain a loan by using the Mary Cassatt

painting and another painting as collateral for the loan. Schwartz began negotiations with a group from Pittsburgh. An art appraise hired to examine Antique Investors' inventory eventually contacted Mark Hoffman, owner of Maxwell Galleries, concerning certain paintings in Antique Investors' inventory. Hoffman realized that Wertz was attempting to sell the paintings which the gallery had shipped to Wertz but which had not yet been paid for. Hoffman discovered that Schwartz had the Jackson Pollock, and Hoffman demanded that the paintings be returned to him. Schwartz insisted that he was given the painting by Wertz as payment for legal fees.*

By February 12, 1974 Schwartz was fully aware of the controversy surrounding the Jackson Pollock. He knew long before that that Wertz was really Von Maker, a convicted felon, who had failed to pay for jewelry and other paintings he had acquired from third persons, and who had incurred substantial debts; and under any theory of the case, he knew long before then of the bogus character of the Sloane bill of sale. Nonetheless, though armed with all this knowledge, on February 12 Schwartz attempted to sell the Jackson Pollock to Mr. and Mrs. Lane for $100,000. The Lanes were undercover FBI agents, and Martin Schwartz was arrested.

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* At trial Schwartz maintained that Wertz gave him the Jackson Pollock as payment for legal fees. According to Schwartz, Wertz gave him a bill of sale from H. E. Sloane to Wertz and one from Wertz to Schwartz for the painting. Schwartz claimed he accepted these receipts as proof that Wertz owned the painting. The government's evidence establishd, however, that Schwartz had had those bogus bills of sale fabricated to protect himself while he tried to dispose of the painting for personal gain (see, *infra*, p. 16).

II. The Government's Case

A. The relationship between Schwartz and Wertz

Martin Schwartz first met Peter Wertz in September, 1973 (Tr. 961),* and agreed to serve as an attorney for Wertz and for Antique Investors, a company owned by Wertz. Wertz had agreed to pay Schwartz a retainer of $1,000 per month plus additional sums depending on the amount of services provided by Schwartz in a particular month. Schwartz, however, kept no records of the number of hours he worked for Wertz or Antique Investors, and he testified that the only criterion he used in judging how much additional to bill Wertz was his "own surmise or feeling about what the appropriate fee would be" (Tr. 1121-1126).**

Schwartz, however, did not simply provide legal services to Wertz and Antique Investors. Schwartz admitted that he had disbursed funds on behalf of Wertz and Antique Investors, and that he had disbursed his own money on behalf of Wertz or Antique Investors (Tr. 1090). At times these loans were on an interest free basis (Tr. 1099, 1117).***

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* Tr. represents reference to the trial transcript, and GX refers to Government Exhibit.

** Schwartz testified that in 1973 he reported about $60,000 income, and earned approximately $15,000 from Wertz and Antique Investors. However, he spent more than one-third of his time working for Wertz and Antique Investors (Tr. 1132-1134).

*** The exact amount of money Schwartz loaned Wertz was impossible to ascertain. Schwartz testified that he did not keep any notes or records reflecting financial transactions with Wertz or Antique Investors (Tr. 1119).

Schwartz and Wertz were also business partners in various ventures. In addition the coventure relating to the acquisition of the Jackson Pollock and a joint investment in Salads of America, which are discussed in detail below, Schwartz and Wertz were coinvestors in various art objects (Tr. 1131). Specifically, Schwartz invested with Wertz in a painting which Schwartz and Wertz sold in July, 1973 and in which Schwartz had invested approximately $10,000 (Tr. 1140); and also invested with Wertz in a painting by Juan Gris (Tr. 1141), and one by Cezanne (Tr. 1141).

Moreover, as outlined below Schwartz had virtually daily contact with Wertz. Thomas Bayne, an employee of Wertz, testified that during the fall and winter of 1973 Wertz spoke to Schwartz at least daily (Tr. 207), and David Kule, president of K.R.R. Associates, testified that Schwartz told him that "he took care of all of Wertz's affairs" and that "[e]verything goes through [him], Schwartz" (Tr. 321).

B. The purchase and attempted resale of three paintings from Maxwell Galleries

1. The negotiations and purchase of the paintings

On June 4, 1973 Peter Wertz began to negotiate with the Maxwell Galleries, San Francisco, California for the purchase of several expensive paintings (Tr. 4). Throughout the negotiations Wertz misrepresented to the gallery his real name, falsely stated that he intended to pay for each painting within thirty days of his receiving the art work, lied when he told the gallery payment was imminent, misrepresented his intention to purchase the painting for his own art collection rather than

to resell the painting, and failed to disclose that he had been convicted of a felony. Wertz portrayed himself as a wealthy collector of fine art and not the owner of a company which buys and sells art and whose financial condition was far from stable.*

In his initial conversation with Blanche Rubenstein, an employee of the gallery, Wertz introduced himself as Peter Wertz and not Harold Von Maker (Tr. 4). Wertz told Rubenstein that he was interested in purchasing paintings in order to round out his personal collection (Tr. 10). Wertz and Rubenstein discussed the possibility of Wertz purchasing a painting by Thomas Hart Benton (Tr. 10). Later that month Wertz telephoned Rubenstein again and Wertz told her about his collection of rare jewels, Chinese Ming vases, and precious manuscripts, and about his desire to improve his American collection (Tr. 15-16). Wertz also inquired whether the gallery might be interested in buying paintings he had by Stella and Utrillo. During that conversation Rubenstein also asked Wertz if he was interested in buying Jackson Pollock's "Crucifixion" (GX 1; Tr. 18).

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* Paragraph One in the indictment alleged that from on or about June 1, 1973 until February 12, 1974 Schwartz and Von Maker participated in a scheme to defraud Maxwell Galleries by means of false and fraudulent pretenses, representations and promises. Defendant Schwartz was not charged, however, in Count One of the indictment which alleges that Von Maker in order to execute the fraud caused to be delivered by mail a letter post marked on August 11, 1973 addressed to Blanche Rubenstein of Maxwell Galleries. Schwartz is charged in Counts Two and Three with mail fraud relating to letters mailed on December 7, 1973 and December 12, 1973. While the government believes there is circumstantial evidence warranting the finding that Schwartz was involved in the fraudulent scheme from its inception in June, 1973, the jury in order to convict Schwartz of Counts Two and Three did not have to find that he had participated in the scheme from its inception.

Several days later Wertz called the gallery and told Rubenstein he was most interested in the Jackson Pollock because it would complement beautifully a painting he had by Karl Appel (Tr. 21). The gallery agreed to sell Wertz the Jackson Pollock "Crucifixion" and Thomas Hart Benton's "Suzannah" (Tr. 22). Wertz agreed to pay thirty days after receiving the paintings (Tr. 22). These two paintings were shipped to Wertz in September 1973 (Tr. 109). In early October, 1973 Wertz also purchased a Mary Cassatt painting from the gallery and agreed to pay within thirty days (Tr. 36).

Wertz had agreed to pay $30,000 for the Jackson Pollock, $25,000 for the Thomas Hart Benton, and $45,000 for the Mary Cassatt (GX 12, 18). In October, 1973 Wertz was billed by the art gallery for $100,000. The gallery did not receive payment for these paintings within the agreed period of time (Tr. 113).* Indeed the gallery was never paid for the three paintings (Tr. 78-79).

2. Schwartz's efforts to sell and to pledge the Jackson Pollock and Mary Cassatt paintings

Schwartz has contended that his initial involvement with any of the paintings purchased from Maxwell Galleries occured in October 1973. According to Schwartz he told Wertz that Wertz owed him a great deal of money

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* Wertz tried to stall the gallery and create the impression that payment was imminent. Thomas Bayne, an employee of Wertz, testified that on several occasions when Rubenstein or Hoffman called, Wertz told Bayne to stall them (Tr. 193). Wertz told Bayne to tell them that he was sick or out of town, and that the money was "going to be on its way." (Tr. 192-193). Moreover, in December 1973 telegrams were sent under Bayne's name to the gallery claiming that funds will be arriving to pay for the paintings, and a bank draft will be sent (GX 28, 29). Bayne testified that he did not send the telegrams (Tr. 195).

which Schwartz needed to meet his financial commitment to Salads of America. Schwartz testified that Wertz offered him a painting instead of cash, and an agreement was arranged in which Wertz gave Schwartz the Jackson Pollock "Crucifixion" with the caveat that if Schwartz should sell or pledge the painting anything obtained in excess of $35,000 would be credited towards Wertz's future legal fees (Tr. 1010).

Schwartz further testified that on November 2 or 3, 1973 Wertz delivered the Jackson Pollock to Schwartz. (Tr. 1026). Edward Loughran testified that he saw the Pollock in Schwartz's office in early or middle October, but by late November the painting was no longer there (Tr. 493). When Schwarttz was arrested on February 14, 1974 he had in his possession a bill of sale for Jackson Pollock's "Crucifixion" dated September 14, 1973 from H. E. Sloane, to Antique Investors. The bill of sale contains the phrase "Paid in Full" (GX 218; Tr. 731, 734). According to Schwartz's trial testimony and statements to the FBI, at no time—from the time Wertz gave him the painting until Hoffman the owner of Maxwell Galleries demanded the painting's return in January 1974—did Schwartz contact or attempt to contact Sloane to determine whether the bill of sale was genuine or whether Sloane did in fact sell the Jackson Pollock to Wertz or Antique Investors (Tr. 731, 1241).*

In October, 1973, prior to or around the date Schwartz claimed he was first given the Jackson Pollock by Wertz, Schwartz asked Edward Loughran if Loughran could arrange a loan for Schwartz. Schwartz offered Jackson Pollock's "Crucifixion" as collateral (Tr. 477-479). When

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* Schwartz testified that in July, 1973 a Mr. Kramer informed him that Sloane was not an acceptable art appraiser (Tr. 1153).

Loughran's efforts failed Schwartz pledged the Jackson Pollock as collateral for a $75,000 loan from Citibank, Central Valley, New York (Tr. 361, 493, 1011). The loan was made on November 28, 1973. Around the same time Schwartz also told Loughran that he and Wertz were still interested in another loan and could provide Loughran with Mary Cassatt's "Portrait of Mme. Cordier" and Peter Brueghel's "Wedding Feast" as collateral (Tr. 500-501). Efforts were also made by Schwartz to dispose of Antique Investors' entire art inventory including the Cassatt and the Thomas Hart Benton (Tr. 494).*

Finally on December 7, 1973 two checks totalling $90,000 were mailed to Blanche Rubenstein as payment for the three paintings (GX 26; Tr. 67). One check was made out for $45,000 and was dated January 15, 1973 (GX 25a), and the other check was for $45,000 and post dated for December 22, 1973 (GX 25). On December 12, 1973 Rubenstein wrote to Wertz acknowledging receipt of the two checks, observing that the gallery was holding on to the post dated check, and inquiring whether the check dated January 15, 1973 should not be January 15, 1974 (GX 27; Tr. 70). After December 12, 1973 Rubenstein received no further telephone calls or letters from Wertz (Tr. 71-73).** When

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* Schwartz's efforts to dispose of the Jackson Pollock and to sell the entire inventory of Antique Investors is outlined below in considerable detail. This section of the statement of facts is simply designed to summarize in chronological order Schwartz's and Wertz's involvement with the three paintings purchased from Maxwell Gallery—the Jackson Pollock, the Thomas Hart Benton, and the Mary Cassatt.

** During all of Rubenstein's telephone conversations and written correspondence with Wertz, Wertz never told her that he was trying to dispose of the three paintings sent to him, never stated that his real name was Von Maker, and never disclosed that he was a convicted felon (Tr. 74-75).

the gallery tried to collect on the checks there were insufficient funds in the bank (Tr. 127).

Around the same time and in part because of a discussion with art appraiser Donald Richards, Mark Hoffman, owner of the gallery, discovered the effort of Schwartz and Wertz to dispose of paintings Hoffman had sold to Wertz, but Wertz had never paid for. On December 31, 1973 Hoffman sent a telegram to Wertz telling him that Hoffman was flying to New York and that Hoffman would go to the District Attorney if the paintings were not returned (Tr. 135-137). During December Hoffman also discovered that Wertz had another name (Tr. 131).

On January 21, 1974 Hoffman told Schwartz he wanted the paintings returned, and that he would see Schwartz in New York (Tr. 141). On January 24 Hoffman met with Schwartz and demanded that Schwartz return the Jackson Pollock (Tr. 143). Schwartz claimed that the painting belonged to him, since his client Von Maker gave it to him as part payment for legal fees. Hoffman asked Schwartz how he could pledge a painting as collateral when that painting belonged to Hoffman (Tr. 143-145). Approximately ten days later Hoffman telegramed Schwartz telling him that Jack Green had authority to pick up the Jackson Pollock for Hoffman. Schwartz refused to turn over the painting (Tr. 146-147).

On February 12, 1974, only one week after Hoffman had attempted again to obtain the Jackson Pollock from Schwartz, Schwartz tried to sell the Jackson Pollock to a Mr. and Mrs. Lane for $100,000. Schwartz ignored completely Hoffman's claim to the painting. Schwartz lied to the Lanes telling them that he owned the painting, that he had obtained the Jackson Pollock from Peter

Wertz, and that he did not know where Wertz had obtained the painting (Tr. 417-420). At the time Schwartz did not realize that Mr. and Mrs. Lane were special agents with the Federal Bureau of Investigation.* After attempting to sell the painting Schwartz was arrested.

C. The Schwartz-Wertz joint venture in Salads of America and defendants' efforts to raise cash for their coventure

Salads of America was a corporation formed in January 1973 for the purpose of exporting and marketing salad vegetables from the Dominican Republic (Tr. 383). According to Schwartz's testimony, in June or July, 1973 Schwartz asked Wertz if Wertz wanted to invest in Salads of America. Wertz agreed to invest $50,000 (Tr. 984-986). On July 28, 1973 Schwartz "acting on behalf of certain investors" purchased a 31% interest in the corporation (GX 150; Tr. 384-385). The "certain investor" was Peter Wertz, but this fact was not divulged to anyone including the other investors in Salads of America. Schwartz was to pay $100,000 for this investment over a 90 day period (Tr. 386-387). Irwin Mininberg, attorney and vice president of Salads of America, testified that Schwartz was late in making his payments on his 31% investment (Tr. 388). The precise date is unclear, but it appears that the monies were owed during the fall, 1973 (Tr. 389).

1) The loan from KRR Associates in order to obtain funds for Salads of America

In order to obtain funds for their investment in Salads of America, Schwartz and Wertz arranged a loan from KRR Associates and Investment Co. The loan agreement was executed on August 6, 1973 about one week

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* The details of this attempted sale are also discussed below.

after Schwartz and Wertz became investors in Salads of America. Schwartz inaccurately told David Kule, President of KRR, that the money would be spent on behalf of Antique Investors (Tr. 307). According to Kule, Schwartz said the loan was to be used to buy paintings from Europe to sell to Japanese buyers (Tr. 295). In fact, however, the money was used to invest in Salads of America. At the closing on August 6, 1973 two checks were presented to Schwartz by Kule (GX 56 56(a)). One check for $30,000 was payable to Antique Investors Corp. (GX 56a). The second check for $70,000 was payable to Martin Schwartz, Esq. (GX 56). Schwartz testified that he disbursed the $70,000 in the following manner: $1,500 to Kule's attorney; $16,800 to Antique Investors; $700 to Schwartz for expenses; $1,000 to Schwartz for legal fees; and the remaining $50,000 was invested in Salads of America (Tr. 1003-1008).

The agreement worked out between Kule and Schwartz consisted of the following: Notes in the amount of $120,000 were made payable from Antique Investors to Wertz, and Wertz discounted the notes to KRR Associates for $100,000. The notes were payable at a rate of $4000 per week for six months, with the 26th payment for $20,000 (GX 47; Tr. 308). The loan was to be secured by a second mortgage on an estate owned by Antique Investors and a painting which Kule testified Schwartz told him was valued at $250,000 (Tr. 293). At the closing on August 6, 1973 Schwartz also agreed to guarantee unconditionally payment of the notes if either the Franz Hals painting used as collateral is determined not to be genuine or the second mortgage is determined to be invalid (GX 54; Tr. 304-305).

The first three notes were paid when they became due in August, 1973 (GX 57, 57-A, 57-B; Tr. 309). The

fourth and fifth notes were returned to Kule because of insufficient funds (Tr. 311). Schwartz gave Kule an $8000 check signed by Schwartz to cover these two notes (GX 58; Tr. 312). When the sixth note also was returned for insufficient funds, Schwartz again gave Kule a check signed by Schwartz for $4000 (GX 58a; Tr. 312). When the seventh note was not properly paid, Schwartz gave Kule a $4000 check signed by Wertz; that check, like the notes, was worthless (Tr. 313). Schwartz provided Kule with another check for $4000 and that check was good (Tr. 313). When note number eight was also not paid, Schwartz gave Kule Wertz's personal check; that too was a bad check (Tr. 318). When Kule informed Schwartz of this development, Schwartz gave Kule $2000 in cash and a $400 personal check. Kule never received any other payments from Schwartz or Wertz on the loan (Tr. 318).

Since the notes were in default, Kule decided to exercise his rights to sell the painting. Kule had the painting appraised by Parke-Bernet, and communicated the result of that appraisal to Schwartz—that the painting was not an original (Tr. 322-325). KRR Associates then initiated a law suit against Schwartz (GX 67; Tr. 329-331).

2) Use of the Jackson Pollock and other art works to generate money for the joint investment of Schwartz and Wertz in Salads of America

a) Attempt to pledge Jackson Pollock through Edward Loughran

The Kule loan did not satisfy the $100,000 investment Schwartz and Wertz had agreed to make in Salads of America. In October 1973 Schwartz asked Edward

Loughran * to find individuals willing to invest in Salads of America. When the individual Loughran thought might be interested in Salads of America rejected the proposal, Schwartz asked Loughran if he could locate a lending institution willing to accept fine art as collateral (Tr. 476-478). Loughran acknowledged that he had someone in mind and Schwartz told him that he had the Jackson Pollock "Crucifixion" that he could pledge as collateral (Tr. 478-479). Loughran asked Howard Albright, a mortgage broker in Pittsburgh, if he could arrange for a loan collateralized by a painting. Loughran reported Albright's affirmative reaction to Schwartz (Tr. 479-481).

Several weeks later—around November 15, 1973—Loughran informed Schwartz that Albright thought a loan could be negotiated, but Albright insisted upon a thousand dollar front fee. Schwartz initially refused to give Albright any money "up front." Probably because Schwartz desperately needed the funds for the investment in Salads of America, Schwartz changed his mind and agreed to pay Albright one thousand dollars, although Schwartz told Loughran he did not trust Albright (Tr. 482-485). According to the letter agreement, Schwartz gave Albright one thousand dollars in return for Albright's efforts to obtain a $125,000 loan for Salads of America collateralized by the Jackson Pollock painting (GX 117).

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* Loughran was a real estate and mortgage broker who had some prior business dealings with Schwartz (Tr. 453, 457-462). Loughran who had participated in a number of frauds unrelated to the facts of this case pleaded guilty to conspiracy to pledge stolen stocks (Tr. 465). Beginning in September 1973 Loughran provided information to the government on matters unrelated to this case (Tr. 470). By December, 1973 Loughran had reported Schwartz's activities to the government. (Tr. 611).

b) Schwartz's pledge of the Jackson Pollock as collateral for $75,000 loan

The loan Albright was to arrange was never consummated. Instead Schwartz pledged the Jackson Pollock for a $75,000 loan from Citibank, Central Valley, New York * (Tr. 361, 493, 1011).

Schwartz informed William Jacobs, loan officer for Citibank, that the proceeds of the loan would be invested in Salads of America (Tr. 364-365). The bank was given a bill of sale from Wertz to Schwartz as proof of Schwartz's ownership of the painting (GX 88; Tr. 362). Schwartz testified that out of the $75,000 loan he paid $1500 to the Chelsea Bank because of an overdraft in Wertz's account, gave Wertz $3500, gave Lee Bonder a $5000 finder's fee, gave Bernard Howard $2500, kept approximately $8000 for himself, and used the remainder to help satisfy his financial commitment to Salads of America (Tr. 1011-1013).**

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* Loughran testified that after his effort to pledge the Jackson Pollock had failed, Schwartz told him that he had pledged the painting for a loan with a bank in upstate New York. Since Loughran had heard that Maxwell Gallery owned the Jackson Pollock, Loughran asked Schwartz how that was possible since the painting did not belong to Schwartz. Schwartz stated that there was no problem because Schwartz created two bills of sale one from C to B and one from B to A, A being Schwartz, and Schwartz had provided the bills of sale as proof of title (Tr. 490-493). Loughran initially placed this conversation as having occurred in November or December 1973 and then later on in his testimony in January 1974 (Tr. 614-615).

** Loughran testified to a conversation he had with Schwartz in Mid-December 1973. At that time Schwartz told Loughran that he had applied $50,000 of the $75,000 loan to Salads of America, and that the remaining $25,000 was given to Wertz. In addition Schwartz gave Wertz an equity position in Salads of Amrica (Tr. 528-529).

c) Schwartz's continuing effort to sell Antique Investor's inventory and to use the Mary Cassatt painting as collateral for a loan

Despite the failure of Albright to obtain a loan collateralized by the Jackson Pollock, Schwartz still endeavored to obtain funds with Loughran's and Albright's assistance. At the end of November, 1973 Schwartz told Loughran that he could provide Peter Brueghel's "Wedding Feast" and Mary Cassatt's "Portrait of Mme. Cordier" as collateral for a loan. (Tr. 500-501).

On November 28, 1973 bills of sale for the Brueghel and the Cassatt were given by Schwartz to Loughran, and Loughran agreed to use the paintings to obtain a $400,000 loan. The bills of sale for the paintings were made out to Loughran and contained Wertz's signature. However, both were prepared from blank Antique Investors' stationary (except for Wertz's signature) at Schwartz's direction. Before telling his secretary how to fill out the bills of sale, Schwartz did not contact Wertz (GX 123, 124; Tr. 500-504.)

In early December, 1973 Albright told Loughran he believed he could place both pieces of art, but needed the paintings delivered to Pittsburgh. Schwartz agreed to Albright's request, and during the first week of December the paintings were driven to Pittsburgh. (Tr. 508-509).

At this same time in November, 1973 Schwartz began an effort to sell the entire art inventory of Antique Investors and Peter Wertz. Schwartz asked Loughran if Albright knew someone willing to purchase an entire art

collection. Albright indicated that he had someone in mind for such an acquisition, and Schwartz stated his client wanted about 3½ million dollars for a collection valued at eight million dollars (Tr. 494).*

A meeting was held in Pittsburgh on December 7 and in New York on December 11 among Schwartz, Loughran, Albright and representatives from a Pittsburgh group which had expressed a willingness to purchase the Brueghel and the Cassatt and possibly the entire inventory of Antique Investors. Wertz attended the second meeting at the request of the Pittsburgh representatives so they could ask him about his criminal activities (Tr. 510-515). At the December 11 meeting the deal for the entire inventory was discussed, and later in the meeting two individuals from Pittsburgh—Mr. Gold and Mr. Ewing—spoke with Wertz privately (Tr. 516).

From December 11, 1973 negotiations continued until late January, 1974, when negotiations were terminated. During that time approximately six or seven different agreements between Antique Investors Peter Wertz and the Pittsburgh group were considered (Tr. 519, 529). Loughran testified the deal fell through when Schwartz declined to guarantee personally title on each painting (Tr. 530).

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* Around November 15, 1973 Schwartz gave Loughran an inventory of Antique Investor's art collection which Antique Investors wanted to sell (Tr. 495; GX 118). Attached to the inventory list is a letter from art appraiser H. E. Sloane dated August 15, 1973. Listed as item 85 on page seven is Thomas Hart Benton's "Sushanna"; items one and two on the last page of the inventory under the heading "Art Acquired by Antique Investors, Inc., since August 15, 1973" are the Jackson Pollock "Crucifixion" and Mary Cassatt "Madame Cordier (GX 118).

d) Mark Hoffman's demand that painting be returned to Maxwell Galleries, and Schwartz's effort to sell the Jackson Pollock to Mr. and Mrs. Lane

In November 1973 Albright hired Donald Richards to appraise the art collection owned by Antique Investors and Peter Wertz (Tr. 876). Around December 15, 1973 because of information Richards had obtained in conducting the appraisal he contacted Mark Hoffman at Maxwell Galleries (Tr. 119, 891). After Hoffman's discussion with Richards, Hoffman attempted to contact Wertz in order to secure the return of the three paintings (Tr. 121). Hoffman was unable to reach Wertz, but did send him a telegram on December 31, 1973 threatening criminal action (Tr. 135-136). On January 24, 1974 Hoffman spoke to Schwartz demanding the return of the Jackson Pollock which Schwartz claimed he owned (Tr. 142-145). Finally, on February 5, 1974 Hoffman sent Mr. Greene to pick up the painting, and Schwartz refused to turn it over to Greene (Tr. 145-147).

Despite the foregoing, Schwartz on February 12, 1974 offered to sell the Jackson Pollock to Mr. and Mrs. Lane (Tr. 716-717, 1048). At the time Schwartz was not aware that Mr. and Mrs. Lane were special agents Thomas McShane and Margo Dennedy of the FBI.* Schwartz told

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* After Schwartz borrowed $75,000 from Citibank he told Leon Bonder, the individual who had helped to procure this loan, that Schwartz needed still more money for Salads of America. Schwartz later told Bonder he would like to sell the Jackson Pollock in order to obtain the necessary funds. (Tr. 1288-1290) Bonder mentioned this to a Mr. Mac Meyer, president of a corporation Bonder was affiliated with at the time. Mac Meyer found two purchasers— Mr. and Mrs. Lane— and Bonder introduced them to Schwartz for purposes of selling the Jackson Pollock. At the time Bonder introduced the Lanes to Schwartz he knew they were FBI agents (Tr. 1290-1292).

McShane and Dennedy that he owned the Jackson Pollock, and could show them a bill of sale from Peter Wertz as legal proof of ownership. Schwartz further stated that he did not know where Wertz had obtained the painting, and that he wanted $100,000 for the painting (Tr. 717-720). They agreed to meet that evening at Schwartz's home.

Later that same day McShane and Dennedy returned to Schwartz's office with special agent Sangillo who was introduced to Schwartz as an art expert. McShane asked Schwartz if they could see the painting, the bill of sale, and the appraisal. After Schwartz gave these items to McShane, the FBI agents arrested Schwartz and advised him of his constitutional rights (Tr. 720-721).

After his arrest Schwartz made a number of statements. He told the FBI agents that he knew Hoffman owned the painting, and that he needed the money he hoped to obtain by selling the painting to pay the gallery (Tr. 722). When the defendant was interviewed by an Assistant United States Attorney, in the presence of FBI agents, he stated that he was a coventurer with Wertz and also served as his attorney (Tr. 729). Schwartz also disclosed a bill of sale from H. E. Sloane to Peter Wertz for the Jackson Pollock painting (Tr. 731).

Agent Sangillo testified to statements Schwartz made to him after Schwartz's arrest. Schwartz asked Sangillo what a grand juror might believe about the explanation Schwartz had previously given the Assistant United States Attorney regarding his acquisition of the Jackson Pollock (Tr. 809). Schwartz was asked by Sangillo about his conversation with Wertz after Schwartz had been told by the Pittsburgh representatives that the painting belonged to Mark Hoffman and not Peter Wertz.

Schwartz said he confronted Wertz with this fact. According to Schwartz, Wertz conceded that the painting

had been obtained from Maxwell Galleries and had not been paid for. Sangillo then asked Schwartz "then you realized, of course, that this document [the bill of sale from H. E. Sloane to Antique Investors] was obviously fraudulent," and Schwartz responded, "yes, they must have been fraudulent" (GX 218; Tr. 826-827).

D. The financial condition of Antique Investors and Peter Wertz, and Schwartz's awareness of their debts and illegal business practices

The financial condition of Antique Investors was desperate;* and Martin Schwartz was well aware of Antique's financial difficulties. Schwartz was in constant communication with Wertz. Thomas Bayne, an employee of Wertz and Antique Investors, testified that he heard Wertz tell Schwartz that "we" needed money badly (Tr. 201), and Bayne further testified that during the fall and winter of 1973 Wertz spoke by telephone with Schwartz at least daily (Tr. 207). Schwartz told David Kule that he took care of all Wertz's affairs (Tr. 321). Schwartz also conceded on cross-examination that Mr. Piccerello, president of the Chelsea National Bank, would call him if Antique Investors' account was overdrawn (Tr. 1100-1101) and that he, Schwartz, sometimes sent to the bank his own personal checks to cover Antique's and Wertz's shortages. Moreover, Schwartz admitted to daily contact with Wertz (Tr. 1090).

Throughout the summer and fall of 1973 Schwartz knew that Wertz and Antique Investors had incurred substantial debts. Schwartz's knowledge pre-dated or was contemporaneous with the time he claims Wertz gave him the Jackson Pollock in payment for legal services. Theo-

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* Schwartz's financial situation also seemed precarious by February 12, 1974—the day he tried to sell the Jackson Pollock to Mr. and Mrs. Lane. His checking account at the Marine Midland Bank was overdrawn by $1,792 on that date (Tr. 1076-1077).

dore Delson was owed $750,000 and as early as May, 1973 Delson spoke to Schwartz about being paid (Tr. 240, 281-283). Schwartz indicated to Delson that he was trying to arrange a two million dollar loan in Switzerland (Tr. 241) and other loans from Pittsburgh and Philadelphia (Tr. 283). Delson is still owed about $600,000 to $700,000 (Tr. 242). Schwartz knew in September and October, 1973 that Wertz owed David Kule tens of thousands of dollars. In fact Schwartz was personally liable on this loan (Tr. 288-332). Furthermore, by September, 1973 the Chelsea National Bank had extended $275,000 in loans to Antique Investors and had made a personal loan of $50,000 to Wertz (Tr. 676). Neither the loans to Antique Investors nor to Wertz were repaid (Tr. 680). Eliot Loshak, vice president of the bank, spoke to Schwartz about these loans during the fall, 1973 (Tr. 683). Schwartz also admitted knowing that in the summer, 1973 various promissory notes signed by Antique Investors were not being honored (Tr. 1167), that in October, 1973 he knew Antique Investors' bank account was overdrawn (Tr. 1223), and that in November, 1973 he knew ACA Galleries had obtained writs of attachment against property of Antique Investors (Tr. 1189), and that a tax lien of nearly $200,000 had been filed against Antique Investors (Tr. 1157). Finally, Schwartz testified during cross-examination that he knew that $100,000 in promissory notes payable to a Samuel Porter by Antique Investors were not paid. Schwartz claimed not to know the reason for the failure to honor the notes (Tr. 1167-1168).

Schwartz was aware of still other debts and potentially unlawful activity by Wertz in the fall of 1973. Robert J. Pasternak, who had been president of Lambert Brothers, a company selling expensive jewelry, testified concerning his sale of a diamond ring to Wertz * for $130,000 on May

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* Pasternak knew Wertz by his real name Harold Von Maker (Tr. 406).

1, 1973. The terms of the contract required Wertz to make a down payment of $30,000, and a final payment of $100,000 on October 31, 1973 (GX 151b, 151c; Tr. 408). Wertz did not pay the $100,000, and in early November, 1973* Pasternak told Schwartz about the money Wertz owed him for the diamond ring (Tr. 411-412). Schwartz eventually informed Pasternak that he would be repaid from the proceeds of certain deals currently being negotiated (Tr. 413).**

By early December, 1973 Pasternak had not been repaid and on December 4, 1973 he received a telegram from Wertz stating that he expected a large check when Schwartz returns from the Dominican Republic (GX 151; Tr. 424-426). Pasternak again contacted Schwartz and Schwartz told him that he was negotiating on Wertz's behalf for the sale of a rare book and that the proceeds of that sale would be paid to Pasternak. Still later Schwartz told Pasternak that he would be paid soon because Schwartz was negotiating to sell art works to a Pittsburgh group. Pasternak and Lambert Brothers have never been paid the $100,000, and have not recovered the diamond (Tr. 425-428).***

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* This apparently occurred around the same time Schwartz contends he was offered the Jackson Pollock by Wertz, and accepted Wertz's bill of sale from H. E. Sloane without checking with Sloane as proof of Wertz's ownership of the painting.

** In late November or early December, 1973 Pasternak again spoke to Schwartz about the diamond he had sold to Wertz. He told Schwartz that he was distressed to hear that Wertz was negotiating the diamond to a third party in violation of Pasternak's agreement with Wertz. Schwartz told Pasternak that he was unaware of this transaction, but not to worry because the money would be forthcoming (Tr. 414-415).

*** Schwartz conceded on cross-examination that Pasternak told him in November, 1973 that Von Maker owed him $100,000 for a diamond and that Von Maker had sold the gem in violation of the agreement between Lambert Brothers and Von Maker (Tr. 1220-1221).

Around October 15, 1973, before Schwartz claims he received the Jackson Pollock from Wertz, Schwartz was informed by a Sally Turner that Von Maker owed money on an art work entitled "The Mountain Men" by Remington. During this conversation Schwartz referred to a Peter Wertz, and Turner asked who this Wertz was because she was interested in monies owed by a Harold Von Maker. Schwartz then told Turner that Wertz was the name Von Maker used because Wertz was a recluse who stayed away from people (Tr. 442-444). Schwartz denied telling Turner that Wertz used two names because he was a recluse (Tr. 1150). Turner had additional conversations with Schwartz about the art work—Turner wanted either her money or the art returned (Tr. 445).*

E. Similar fraudulent acts by Wertz

Wertz's efforts to obtain art works and fine jewelry by false pretenses were not limited to defrauding Maxwell Galleries, Lambert Brothers, Sally Turner, and Theodore Delson. On August 13, 1973 Wertz, with Schwartz serving as his attorney, entered into an agreement with Samuel Porter providing in part that Wertz, having previously received Utrillo's "Chateau de Lion Sur Mer" from Porter, will continue to hold the painting on consignment and within ninety days either return the painting or pay Porter $30,000 (GX 156; Tr. 1170-1172). Thus, under the agreement Wertz represented that as of August 13, 1973 he still had the Utrillo on consignment from Porter.

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* Approximately one month after this conversation with Turner, Schwartz gave Loughran an inventory of Antique Investor's art collection which Schwartz was offering to sell for Antique. (Tr. 495) Item number 30 on that list was Frederic Remington's "Mountain Man"—the painting Sally Turner sold to Wertz and Turner told Schwartz Wertz had not paid for (GX 118).

In fact, however, on July 20, 1973, prior to the date of this agreement with Porter, Wertz had sold the Utrillo to Feigen Galleries for $20,000 (GX 156; Tr. 1172-1174).* The $30,000 was not paid to Porter, and the Utrillo painting was never returned.

Paragraph thirteen of the Wertz-Porter agreement also provided that Wertz would deliver to Schwartz, as escrow agent, a painting by Lucas Cramnach along with proof of ownership and authenticity. The painting was to serve as collateral for Porter on Wertz's agreement to return the Utrillo or to pay $30,000. Schwartz signed this agreement as attorney for Wertz, and also signed as escrow agent the following: "Painting and Documents referred to in Paragraph 13 have been delivered to the undersigned who accepts the escrow provisions therein." (GX 156; Tr. 1174-1180). Through his attorney A. Harry Kupersmith, Porter demanded the painting and the documents relating to authenticity and genuineness when it became apparent that Wertz was not going to return the Utrillo or pay the $30,000. Schwartz did not deliver the documents (Tr. 1179-1182; GX 157, 159c), despite his representation in the August 13, 1973 agreement that he had received the documents as escrow agent (GX 156). Indeed the documents were not forthcoming even after Kupersmith wrote to Schwartz on February 6, 1974—one week before Schwartz tried to sell the Jackson Pollock—threatening to refer the matter to the Bar Association if Schwartz failed to turn over the requested documents in accordance with Schwartz's representation in the August 13, 1973 agreement (GX 159c).**

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* The Government offered as evidence a check drawn by Richard Feigen & Co., payable to Peter Wertz, for $20,000 dated 7/20/73, and containing the notation "Payment in full for Maurice Utrillo Chateau de Lion Sur Mer, 1930." (GX 156; Tr. 1173-1174). Schwartz denied seeing this check (Tr. 1173).

** Schwartz signed a statement admitting that he had not delivered the documents proving the authenticity and genuineness of the Lucas Cramnach painting to Porter, but would do so within

[Footnote continued on following page]

Schwartz also admitted that at some point he was told by an official from the Chelsea National Bank that certain items Wertz had pledged as collateral for a loan were not genuine. Schwartz could not recall when he was given this information (Tr. 1225-1280).

F. Schwartz's knowledge that Peter Wertz was in fact Harold Von Maker

Apart from the evidence that Schwartz knew of Wertz's true identity no later than the summer of 1973, Schwartz learned unequivocally on October 5, 1973, of the criminal character of his client. On that date FBI agent Donald Mason told Schwartz that the man Schwartz knew as Peter Wertz was actually Harold Von Maker, and that Von Maker had a reputation as a confidence man in the art world, and that he had an arrest record (Tr. 710-711). Schwartz conceded that Mason relayed this information to him, but asserted that this was the first time he had learned Wertz was actually Harold Von Maker, (Tr. 1014).

The government's evidence revealed that Schwartz knew about the true identity of Peter Wertz long prior to October 5, 1973. Theodore Delson testified that in August, 1973 he confronted Wertz with the possibility that he was in fact Harold Von Maker. Wertz denied being Harold Von Maker. Delson recalled vividly that Schwartz was present during that conversation (Tr. 245-247).

Even under Schwartz's version of when he was initially informed that Wertz was Harold Von Maker, a reputed confidence man in the art world, Schwartz was

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a few days (GX 157). Schwartz, however, claimed at trial that either after he signed the statement or after Kupersmith's February 6 letter he did deliver the documents relating to authenticity (Tr. 1184-1187).

necessarily cognizant of Wertz's duplicity prior to the time Schwartz claims he was given the Jackson Pollock by Wertz, prior to the time Schwartz tried to pledge and to sell the Jackson Pollock and other paintings, and prior to Schwartz's attempt to sell the Jackson Pollock to undercover FBI agents.

III. The Defense Case

The defendant testified on his own behalf. He contended that in October, 1973 he told Wertz that Wertz owed him $35,000 in legal fees. Wertz said that he did not have the money, but offered him a Jackson Pollock painting as payment for the legal fees. Schwartz agreed and on November 2, 1973 the painting was delivered to him (Tr. 1010-1012). Schwartz was given a bill of sale dated September 14, 1973 from H. E. Sloane to Wertz as proof of Wertz's ownership of the painting.

Schwartz denied ever conspiring with Wertz to devise any scheme to defraud Maxwell Galleries or to obtain the Jackson Pollock, or the Thomas Hart Benton, or the Mary Cassatt from the gallery (Tr. 1068). He denied knowing when he accepted the painting from Wertz that Wertz had obtained it from Maxwell Gallery, and that up until January, 1974 he did not know that Wertz had sent post-dated checks to the gallery (Tr. 1069). He further denied having anything to do with the preparation or mailing of any letters to Maxwell Galleries relating to the acquisition of or payment for the paintings, and that when he attempted to sell the Jackson Pollock on February 12, 1974 he absolutely believed he had good title to the painting (Tr. 1070).

Schwartz also specifically denied the veracity of testimony by certain witnesses. He denied telling Mrs. Turner that Von Maker used the name Wertz because he was a recluse (Tr. 1150). He denied being present

when Delson asked Wertz if he was really Von Maker (Tr. 1160), and he said that he could not recall telling Sangillo, the FBI agent, that he knew the Sloane bill of sale was fradulent (Tr. 1261).

Loretta Burriesci, Schwartz's secretary testified on behalf of Schwartz. She contradicted Loughran's testimony that Loughran was in Schwartz's office on almost a daily basis after October 31, 1973; she claimed that from November 15 until January 15 Loughran was in Schwartz's office about five or six times (Tr. 837-838). She also testified that there was not a regular supply of Antique Investors' stationery in Schwartz's office. She further testified that in October 1973 Schwartz told her that Wertz's real name was Von Maker, and that Schwartz seemed very upset about this news (Tr. 841-842).

Donald Richards the art appraiser from Pittsburgh also testified (Tr. 874). He testified that even after Albright was informed about the sale of the paintings from Maxwell, Albright did not tell Richards to abandon his effort to purchase the Wertz collection (Tr. 892-893).

Schwartz also called several character witnesses (Irwin Mininberg, Tr. 394-396; Lawrence Sherman, Tr. 954-956; Robert J. Moss, Tr. 957-959; Myron Slosberg, Tr. 959-961; James P. McLoughlin, Tr. 974-977).

ARGUMENT

POINT I

The evidence was more than sufficient to support the jury's finding that Wertz's conduct constituted a scheme to defraud within the meaning of 18 U.S.C. § 1341, and an unlawful taking within the meaning of 18 U.S.C. § 2315.

Point I of defendant's brief essentially asks this Court to set aside the verdict on the basis of the same arguments which trial counsel argued at length and unsuccessfully on the jury below. The defendant claims that the course of dealings between Wertz and Maxwell Galleries did not constitute fraud within the meaning of 18 U.S.C. § 1341, or unlawful conversion within the scope of 18 U.S.C. § 2315. Judge Griesa, however, properly fully, and coherently charged the jury on the law concerning these factual issues and by its guilty verdict the jury clearly resolved the issue against the defendant.

In *United States* v. *Taylor*, 464 F.2d 240, 242-245 (2d Cir. 1972) this Court adopted the formulation enunciated by Judge Prettyman in *Curley* v. *United States*, 160 F.2d 229, 232-233, *cert. denied*, 331 U.S. 837 (1947) for reviewing the sufficiency of evidence in a criminal case.

> The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.

See also *United States* v. *Wiley*, — F.2d —, Dkt. No. 75-1082, Slip op. at 5213 (2d Cir. July 29, 1975); *United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974).

Applying this standard to the facts of this case, Judge Griesa properly permitted the case to go to the jury, and no grounds exist for disturbing that decision on appeal. As set forth in the detailed statement of facts herein, there was abundant evidence adduced from which a reasonable mind might fairly have concluded guilt beyond a reasonable doubt.

Throughout his entire course of dealings with Maxwell Galleries, Wertz never disclosed that his real name was Harold Von Maker that he had been convicted of a felony and that he had a reputation as a confidence man (Tr. 4). Rather, he portrayed himself as a fabulously wealthy art collector by the name of Peter Wertz who wanted the three paintings in question to enhance his own private collection (Tr. 10, 15-16), and represented that he would pay for those paintings within 30 days of receipt.

In truth, however, Wertz was a convicted felon who, at the time of his letter of August 11, 1973 to Maxwell Galleries containing his representations concerning payment, was without any legitimate expectation of being able to make payment. He and Antique were already heavily indebted and owed great sums of money or valuable art works to such individuals and entities as Theodore Delson, Chelsea National Bank, David Kule of K.R.R., Samuel Porter, Sally Turner and Lambert Bros. In these circumstances the jury could not only have properly concluded but was almost virtually compelled to find that Wertz had no intention of keeping his promise

to pay $100,000 for three paintings within the promised 30 day schedules, if indeed he intended ever to pay at all.* Moreover, after the agreed upon period for payment had come and gone, Wertz continued to deceive the gallery into believing payment was imminent.** Significantly, in purported payment for the paintings, Wertz mailed two $45,000 checks to the gallery in December 1973 (Tr. 67, 127) at a time when his accounts were virtually devoid of money with which to pay those checks.

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* Schwartz relies for a contrary inference on Wertz's supposed "substantial equity in the Jackie Gleason estate and an interest in valuable works of art" (Brief, p. 29). The reliance is misplaced. Antique Investors had purchased the Gleason estate in Septmber 1972 for $250,000, paying $50,000 down and obtaining a $200,000 mortgage. The $50,000 actually paid came from moneys Wertz had borrowed from Delson. A second mortgage on those premises was later given by Antique and Wertz to Kule on August 6, 1973, as collateral for his $100,000 "loan" to Antique Investors. To say that Wertz, on August 11, 1973 or at any time thereafter, had any equity in the Gleason premises, the mortgage on which was later foreclosed by the first mortgagee, is frivolous.

Any apparent interest Wertz could be said to have had in Antique Investors' art collection was similarly imaginary. Antique Investors possessed full and clear title to few if any items of that collection. The great bulk had of course been purchased with borrowed moneys or obtained on consignment from others and were burdened by a general security interest running to others. Moreover, some of that collection was obtained by outright fraud or was clearly not genuine (see, e.g., *supra*, pp. 14, 22-26).

** For this Wertz employed, among other things, a string of telegrams purportedly sent by Tom Bayne, but of which the latter knew nothing, containing a host of false representations concerning Wertz's whereabouts, health and expectations of the imminence of arrival of money from the Salads of America venture with which to pay the gallery. Schwartz seizes upon the gallery's supposed failure to press its claim for payment as purported evidence of the fact that even if Wertz misreprsented his intention with respect to the timing of payment, the latter was not material to the gallery (Brief, p. 30). That contention simply ignores the fact that it was Wertz's continuing pattern of fraudulent conduct and false representations which occasioned the gallery's slowness to act in the face of the breach of the original promise to pay within 30 days.

Further, Wertz's representation that he wished to purchase the paintings in order to "round out" his personal collection was utterly false.* Notwithstanding defendant Schwartz's claim to the contrary (Brief, p. 29), the government adduced clear evidence that almost immediately upon his receipt of the three paintings, Wertz added them not to his personal collection but rather to the written inventory of Antique Investors' collection, and began thereafter in Antique's name to seek to dispose of them by sale or by pledging them as collateral for loans See *supra*, pp. 14-19; GX 118).

Furthermore, in determining whether Wertz had defrauded the gallery, the jury could properly have considered the similar pattern of fraud perpetrated by Wertz on Samuel Porter, Lambert Brothers, Chelsea National Bank, Theodore Delson and others during the same time period.

In deciding whether Wertz's course of conduct constituted a scheme to defraud or an unlawful taking as contemplated by 18 U.S.C. § 1341 and § 2315 respectively, the jury was properly instructed by the trial judge. We believe it significant that the defendant in his brief neither explicity nor implicity questions the accuracy or adequacy of Judge Griesa's instructions. Judge Griesa described what constitutes fraudulent representations and fraudulent promises, and further instructed the jury that they could not convict unless they found the false representations or promises to be material (Tr. 1441-1444). He outlined the defendant's argument on this issue as well as the Government's contentions (Tr. 1442-1443, 1448-1454). He later instructed the jury on what con-

* To foster this image of a private collector wishing to see the paintings in his own home before conclusively deciding to add them to his personal colelction if they were as they appeared in photographic reproductions, Wertz's written communications to the gallery were always on his personal letterhead and not that of Antique Investors (see, e.g., GX 9, 16, 22, 26).

stituted an "unlawful taking" for purposes of Counts Nine and Ten of the indictment (Tr. 1467). The jury, armed with these concededly proper instructions which Schwartz does not question on appeal, decided that Wertz's statements and conduct towards the gallery fell within the proscriptions of 18 U.S.C. § 1341 and § 2513. Defendant has provided no cogent justification for this Court to disturb that finding.

The cases in this Circuit make it abundantly clear that Wertz's course of conduct provides a sufficient factual predicate for the jury's finding that the defendants defrauded the art gallery. In *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970) this Court analyzed in detail the essential elements of a scheme to defraud in a mail fraud prosecution. The Court stated that the government must prove that "some actual harm or injury was *contemplated* by the schemers." 421 F.2d at 1180 (emphasis in original). The Court elaborated:

> Although proof that the injury was accomplished is not required to convict under 1341, we believe the statute does require evidence from which it may be inferred that some actual injury to the victim, however slight, is a reasonably probable result of the deceitful representations if they are successful. 421 F.2d at 1182.

There is no question but that the actions of Wertz had the reasonable and probable result of injuring Maxwell Galleries. This is not a case like *Regent Office Supply*, *supra*, where, based on the facts this Court was unable to conclude that the scheme contemplated an actual injury to a victim. Judge Moore's opinion observed that the government had failed to show the reaction of the victims to the alleged fraudulent scheme. 421 F.2d at 1176, 1181. See also *United States* v. *Koenig*, 388 F. Supp. 670, 722 (S.D.N.Y., 1974).

What actually occurred in this case vividly proves that Wertz's conduct towards Maxwell Gallery had the "reasonable and probable result" of causing injury to the victim. There were at least three instances where defendant's conduct almost resulted in substantial loss to the victim—art gallery. First, Schwartz pledged the Jackson Pollock as collateral for a $75,000 loan. If Schwartz had defaulted on the loan, the bank as a holder in due course might well prevail over the gallery in any litigation to determine the legal ownership of the painting. Second, if Schwartz and Wertz had successfully sold the Mary Cassatt or the Thomas Hart Benton to the Pittsburgh group, and this group purchased the paintings without any knowledge of the disputed title, and were otherwise good faith purchasers, the gallery might fail in any legal effort to regain the paintings, and would have incurred a substantial financial loss. Finally, suppose Mr. and Mrs. Lane were not government agents, but private citizens who purchased the Jackson Pollock in good faith from Schwartz. The gallery again might be in the position of losing the paintings to the Lanes. In each instance because of defendants' actions the gallery would have lost legal ownership of the painting without any monetary compensation.

Wertz's conduct involved not only explicit prevarication, but also half truths and concealment of material facts, which courts have held fall within the strictures of the mail fraud statute. See *Lustiger* v. *United States*, 386 F.2d 132, 138 (9th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968); *Williams* v. *United States*, 368 F.2d 972 (10th Cir. 1966). The harm visited upon Maxwell Gallery is best summarized by Judge Hand's opinion in another mail fraud case, *United States* v. *Rowe*, 56 F.2d 747, 749 (2d Cir.), *cert. denied*, 286 U.S. 554 (1932):

> The indictment did not allege that the claimants suffered any loss . . . Civilly, of course the

> action would fail without proof of damage, but that has no application to criminal liability. A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a Court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the statute is directed.*

Maxwell Gallery was thus deprived of the opportunity to bargain with knowledge of all the pertinent facts. The evidence elicited by the government was more than adequate to demonstrate a course of conduct designed to defraud the gallery. Through false representations, half truths, and deliberately deceptive actions, Wertz defrauded from Maxwell Gallery three expensive and fine works of art.

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* *United States* v. *George*, 477 F.2d 508, 512-515 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973) is another example where a court found a particular scheme within the proscription of the mail fraud statute because the victim lost the opportunity to bargain with the relevant facts. In *George*, Yonan was a buyer in Zenith's purchasing department responsible for negotiating with cabinet vendors. He arranged a deal in which he awarded Zenith's cabinet contracts to a co-defendant, Greensphan, in return for a $1 per cabinet kickback. The kickbacks were paid through a company owned by the third defendant. The court rejected appellant's arguments that the government failed to prove a scheme to defraud because the quality of the cabinets supplied Zenith was good, the price was fair, and Zenith suffered no economic harm. The court found that Zenith was in fact defrauded because Zenith did not know that Greenspan was willing to sell the cabinets for less money than Zenith actually paid for them. The court quoting from Judge Hand's opinion in *United States* v. *Rowe* characterized this fraud as "a very real and tangible harm to Zenith in losing the discount or losing the opportunity to bargain with a most relevant fact before it." 477 F.2d at 513.

POINT II

The evidence is more than ample to prove that Schwartz participated with Wertz in a criminal enterprise to defraud Maxwell Galleries.

Point II in defendant's brief is also an attack on the sufficiency of the government's evidence. As with the similar argument advanced in Point I, it is without merit. When viewed in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Tropiano*, 418 F.2d 1069, 1074-1075 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970), there was more than sufficient evidence to support the jury's findings that the defendant joined with Wertz in a scheme to defraud Maxwell Gallery, and that he engaged in activity amounting to an unlawful taking within the meaning of 18 U.S.C. § 2315.*

The statement of facts amply demonstrates that sufficient evidence exists to support the jury's finding that by December 7, 1973** Schwartz had joined with Wertz in a

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* Defendant's argument is premised on alleged unawareness of Wertz's dealings with Maxwell Galleries. The jury resolved this factual issue against the defendant. In *United States* v. *Simon*, 425 F.2d 796, 801 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970), an accountant was convicted for violating 18 U.S.C. § 1341. Judge Friendly, writing for a unanimous panel, stated:

> . . . there were some sharp disagreements concerning just what defendants knew and when they learned it. Issues of credibility, however, were for the jury, and we here set forth what the jury could permissibly have found the further facts to be.

** Schwartz was not charged in the first mail fraud count premised on a letter mailed on August 11, 1973. Schwartz is charged with mail fraud relating to letters mailed on or about December 7, 1973 and December 12, 1973. Therefore, to convict Schwartz on Counts Two and Three the jury had to find that Schwartz participated in or aided and abetted the scheme to defraud by December 7, 1973.

scheme to defraud Maxwell Galleries. A detailed recapitulation of that statement is unnecessary; a few of the more salient facts should suffice.

First, by October 5, 1973 Schwartz knew that Von Maker had misrepresented himself as Peter Wertz. Schwartz was told by an FBI agent that Von Maker was a convicted felon with a reputation in the art world as a confidence man (Tr. 710-711, 1014). There was also testimony from Theodore Delson that as early as the summer, 1973, and based on a private investigative report, Delson confronted Wertz and Schwartz with Wertz's duplicity concerning his real identity (Tr. 245-247). Schwartz denied that any such incident had occurred. Further, even under Schwartz's version of how he obtained the Jackson Pollock, which of course the jury was under no obligation to accept, the fact remains that Schwartz accepted a painting from a man he knew to be an art swindler and heavily in debt, without making any effort whatsoever to verify Wertz's ownership of the Jackson Pollock (Tr. 1241). Even if Wertz had given Schwartz a bill of sale from H. E. Sloane as proof of ownership, it would have been a simple matter to call Sloane and verify the sale as Schwartz admits he did not. More importantly, however, Loughran testified that Schwartz had admitted to him that he, Schwartz, had had two bogus bills of sales created as proof of ownership in order to protect himself when dealing with the Pollock because he knew it had been acquired by Wertz from Maxwell Galleries and had not been paid for (Tr. 490-493, 614-615). The jury had the sole discretion to credit the testimony of Loughran and Delson and reject that of Schwartz.*

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* Judge Griesa instructed the jury that Loughran's testimony should be viewed with great caution and scrutinized carefully (Tr. 1423).

Second, Schwartz was cognizant of other fraudulent or illegal practices on the part of Wertz. He knew that Wertz had purchased a diamond for $130,000 from Lambert Brothers and was endeavoring to sell that diamond, even though Wertz still owed $100,000 and Wertz's attempted resale violated the purchase agreement between Wertz and Lambert Brothers (Tr. 408-425). Schwartz knew in October, 1973 that Wertz owed money on a sculpture purchased from Sally Turner (Tr. 442-445). And yet this sculpture was included in the inventory of art Schwartz tried to sell, presumably on behalf of Wertz and Antique Investors. Schwartz also falsely told Turner that Von Maker used the alias Wertz because he was a recluse. Schwartz also knew of Wertz's dealings with Porter over a painting by Utrillo (Tr. 1170-1182). Schwartz was further aware long before December, 1973 that Wertz had still owed approximately $600,000 in cash and art to Delson, $275,000 to Chelsea National Bank, and tens of thousands of dollars to KRR Associates.* Schwartz was further told that some of the objects Wertz had pledged as collateral for the Chelsea and KRR loans were not authentic and not worth nearly what Wertz contended they were worth (Tr. 1225-1280, 322-325). Thus, Schwartz was not a lawyer counseling a client he had no reason to distrust. Schwartz was a business partner with, and an art salesman for, a client he knew was incurring substantial debts, selling paintings and jewelry he did not own, pledging art items which were not genuine, and possibly stealing from Theodore Delson, Chelsea National Bank, David Kule, Lambert Brothers, Sally Turner, and Samuel Porter.

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* Schwartz was cognizant that another art gallery had obtained writs of attachment against Antique Investors, that a $200,000 tax lien had been filed against Antique Investors, and that the company's bank account was overdrawn.

The third source of evidence inculpating the defendant are statements made by him to FBI agents both before and after his arrest.* During the course of what Schwartz hoped would be a $100,000 sale of the Pollock, Schwartz falsely told the agents he did not know where his client, Wertz, had obtained the Pollock which he had later given to Schwartz, assertedly in lieu of legal fees.** In contrast, immediately after his arrest, Schwartz told the FBI agents that he knew Hoffman owned the painting, and that he hoped to pay Hoffman from the proceeds of his aborted sale of the Jackson Pollock to Mr. and Mrs. Lane. Schwartz acknowledged to FBI agent Sangillo that he knew that the bill of sale from H. E. Sloane was bogus (Tr. 722-731). Schwartz also wanted to know how a grand jury might react to his explanation regarding the acquisition of the Jackson Pollock (Tr. 809). At trial Schwartz denied having made those statements.

The fourth general source of incriminating evidence is the entire effort by Schwartz to obtain funds for the joint investment of Schwartz and Wertz in Salads of America. In October, 1973 when Loughran could not find direct investors for Salads of America, Schwartz asked him to arrange a loan collateralized by the Jackson Pollock (Tr.

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* The effort of Schwartz to sell the painting on February 12, 1974 after Hoffman demands its return is further evidence of Schwartz's unlawful participation with Wertz in a scheme to defraud the art gallery.

** While Schwartz asserted he had accepted the paintings in lieu of legal fees, he produced no documentary evidence of any such fees earned nor could he provide even the most elemental description of how he calculated what fees were owed to him by Antique and Wertz. Moreover, while Schwartz stated to the FBI agents subsequent to his arrest that he had not been paid his $1,000 a month legal retainer by Antique and Wertz since April 1973, the government adduced documentary evidence that Schwartz had been paid that retainer at least through July 1973 (GX 170).

476-481). When this effort failed, Schwartz obtained a $75,000 loan on his own by pledging the Jackson Pollock at Citibank in upstate New York (Tr. 361). Schwartz then tried to secure another loan offering to pledge the Mary Cassatt and another painting (Tr. 500-501). Finally Schwartz endeavored to sell the entire art inventory of Wertz and Antique Investors, and eventually he tried to sell the Jackson Pollock to undercover agents. Schwartz pursued this course of conduct in order to raise funds to meet a joint commitment he and Wertz had in Salads of America. The jury could fairly have concluded that Schwartz attempted to sell or transfer the Pollack, even though he knew of Wertz's true criminal character and the origins of the painting, because he desperately needed the funds for Salads of America and to keep Antique Investors afloat—a company which had provided substantial income to Schwartz in a variety of ways.

Schwartz devotes several pages in his brief to demonstrating that in accordance with the Uniform Commercial Code he was a "good faith" purchaser of the Jackson Pollock and he, therefore, received good title to the painting. Judge Griesa unambiguously instructed the jury that good faith was an absolute defense to the charges against Schwartz (Tr. 1454). Thus, if the jury had concluded that Schwartz in receiving or pledging or attempting to sell the Jackson Pollock had acted in good faith without knowledge that Von Maker had acquired the painting by means of fraud, then the jury was compelled to acquit.*

Moreover, the technical question of title to goods and merchandise is simply not apposite to this criminal prosecution. Several cases have held in the context of prosecutions involving interstate transportation of stolen goods,

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* Crediting the testimony of Loughran alone, Schwartz was hardly a good gaith purchaser of the Jackson Pollock.

securities, and motor vehicles that Congress intended to reach a broad range of activity relating to stolen goods, and the statute is applicable whenever a "person dishonestly obtains goods or securities belonging to another with the intent to deprive the owner of the rights and benefits of ownership." *United States* v. *Handler*, 142 F.2d 351, 353 (2d Cir.), *cert. denied*, 323 U.S. 741 (1944). See also *United States* v. *Turley*, 352 U.S. 407, 416-417 (1957); *United States* v. *Fistel*, 460 F.2d 157, 162 (2d Cir. 1972); *Stewart* v. *United States*, 395 F.2d 484 (8th Cir. 1968); *Boone* v. *United States*, 235 F.2d 939 (4th Cir. 1956); *United States* v. *DeNormand*, 149 F.2d 622 (2d Cir.), *cert. denied*, 326 U.S. 756 (1945). As Judge Lasker stated in *United States* v. *Plott*, 345 F. Supp. 1229, 1232 (S.D.N.Y. 1972):

> The act of stealing is as much defined by the taker's intent to keep property to which he has no right as it is by esoteric questions of legal title in others.

Judge Friendly's recent opinion in a case where two attorneys were convicted of mail fraud is appicable with equal vigor to Martin Schwartz:

> We repeat also that lawyers cannot "escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen."

United States v. *Frank*, 494 F.2d 145, 152-153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974) (quoting *United States* v. *Benjamin*, 328 F.2d 854, 863 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964). See also *United States* v. *Natelli*, — F.2d —, No. 75-1004, Slip op. at 5185-5186 (2d Cir. July 28, 1975). Indeed Martin Schwartz did considerably more than close his eyes to the obvious. He actively sought to defraud Maxwell Galleries and

to convert unlawfully Jackson Pollock's "Crucifixion." The jury so found, and the evidence to support that verdict is ample. The defendant was given ample opportunity to dispute the government's contentions, and the jury by its verdict apparently rejected his claims of innocence. See *United States* v. *Natelli*, supra, at 5177, 5181.

The jury heard from a host of witnesses showing Schwartz's knowledge of and at times complicity with Wertz's illicit activities—Theodore Delson, Sally Turner, Edward Loughran, David Kule, Robert Pasternak, and the victims of the fraud, Mark Hoffman and Blanche Rubenstein. The jury had the right to credit the testimony of these witnesses, a point defendant's brief utterly fails to recognize. Crediting these witnesses and the documents received in evidence, the evidence overwhelmingly supports the jury's guilty verdict against Martin Schwartz.

CONCLUSION

The judgment of conviction should be affirmed

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

RICHARD D. WEINBERG,
JOHN C. SABETTA,
Assistant United States Attorneys, Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Richard Weinberg being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 18th day of September 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Edward Brodsky, Esq.
Goldstein, Thames & Hyde
655 Madison Avenue
New York, New York 10021

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Richard D. Weinberg

Sworn to before me this

18th day of September 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977